

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRONTIER AIRLINES, INC,

Plaintiff,

vs.

Case No.:
1:20-CV-09713-
LLS

AMCK AVIATION HOLDINGS IRELAND
LIMITED, ACCIPITER INVESTMENT 4
LIMITED, VERMILLION AVIATION
(TWO) LIMITED, WELLS FARGO TRUST
COMPANY, N.A., solely in its
capacity as OWNER TRUSTEE, and
UMB BANK, N.A., solely in its
capacity as OWNER TRUSTEE,
Defendants.

April 4, 2022
9:59 a.m. MDT

TRANSCRIPT CONTAINS CONFIDENTIAL AEO SECTION

Remote video-teleconference deposition of
ROBERT FANNING, taken by Defendants, held at Denver,
Colorado, pursuant to notice, before Elizabeth F.
Tobin, a Registered Professional Reporter and Notary
Public of the State of New York.

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A P P E A R A N C E S:

On behalf of the Plaintiff:

LANE POWELL, P.C.

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BY: DAVID G. HOSENPUD, ESQ.

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(via video-teleconference)

On behalf of the Defendants:

CLIFFORD CHANCE, LLP

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212.878.8000

BY: JEFF E. BUTLER, ESQ.

jeff.butler@cliffordchance.com

GEGE WANG, ESQ.

(via video-teleconference)

1 R. Fanning

2 A. That is correct.

3 Q. Is it consistent with your memory that
4 that aircraft was delivered on Monday, March 16th?

5 A. I do not recall. If that's the date
6 you're telling me, then I'll take that as the
7 delivery date.

8 Q. Based on this email which you have here
9 in front of you, does that refresh your memory that
10 that delivery took place on March 16?

11 A. The email looks familiar but I don't
12 recall the dates of this specific delivery.

13 Q. Do you have any reason to doubt that it
14 was on Monday, March 16?

15 A. No.

16 Q. This MSN 10038, do you understand that to
17 be the first delivery of aircraft under the
18 framework agreement with AMCK?

19 A. That is correct.

20 Q. So AMCK provided the funds to purchase
21 this aircraft or purchase the aircraft from
22 Frontier, rather, and then there was a lease
23 applicable to this aircraft; is that right?

24 A. Correct.

25 MR. BUTLER: Let me show you what we've

1 R. Fanning

2 marked as Exhibit 2 which is a document bearing
3 Bates Number Frontier 240 to 242.

4 (Fanning Exhibit 2, 3/16/20 email with
5 attached letter; 3 pages, marked for
6 identification.)

7 MR. BUTLER: If you could just show the
8 top of the email, Gege.

9 Q. This appears to be an email from Spencer
10 Thwaytes to Jane O'Callaghan dated Monday, March 16,
11 2020. It refers at the top to please see the
12 attached concession requested letter.

13 MR. BUTLER: Gege, if you go to the
14 second page.

15 Q. You'll see there's a letter from Frontier
16 to Ms. O'Callaghan dated March 16, 2020.

17 Have you seen this letter before?

18 A. Yes.

19 Q. What is it?

20 A. It's basically a request to deferments
21 for a specific given time.

22 Q. It was a request to AMCK for a deferral
23 of rent for a three-month time period; is that
24 right?

25 A. That is correct.

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R. Fanning

Q. And it looks like there's also a request in this letter, if you look down the page to number 2, for return of one month's rent security deposit.

Do you see that?

A. Yes.

Q. What is that asking for?

A. So typically when we sign a lease, depending on the lessor, they may request a one month's rent that is paid on a monthly basis. That amount is held by the lessor for the term of the lease.

Q. And in this letter you are asking or Frontier was asking in addition to the rent deferral to have a refund of that security deposit; is that right?

A. That is my understanding, yes.

Q. And it refers to one month's rent security deposit, but that would be, if I understood you correctly, the whole amount of the security deposit; is that right?

A. Correct.

Q. Just below that text, it says, quote, the above concessions would be documented in a mutually agreed deferral and concession agreement, end quote.

1 R. Fanning

2 Do you see that text?

3 A. Yes.

4 Q. Was it your understanding that if there
5 was agreement on this deferral and refund that would
6 be documented in a normal agreement signed by both
7 parties?

8 A. Yes. As it was with other lessors;
9 correct.

10 Q. Were you involved in drafting this
11 letter?

12 A. I was involved in what the ask would be
13 with myself, Spencer and Jimmy Dempsey. So, yes.

14 Q. Do you know who drafted it, who drafted
15 the texts?

16 A. I don't recall, no.

17 Q. Do you know when this letter was drafted?

18 A. I have -- a specific date, no.

19 Q. Do you remember roughly how long this
20 letter was sent on March 16th that the letter was
21 drafted?

22 A. I do not.

23 Q. Was this letter -- does it follow the
24 same format of letters that Frontier sent to other
25 lessors around this time?

1 R. Fanning

2 A. That is correct.

3 Q. Did Frontier send a letter similar to
4 this to all of its lessors?

5 A. Correct.

6 Q. How many lessors were there at that time?

7 A. I can't give you an exact number, but 16
8 would come to mind.

9 Q. Did all of these letters go out on the
10 same day or did they go out on different days?

11 A. They all went out on the same day, from
12 what I can recall.

13 Q. So your recollection is they all went out
14 on Monday, March 16?

15 A. That is my understanding, yes.

16 MR. BUTLER: Let me show you what we're
17 going to mark as Fanning Exhibit 3.

18 (Fanning Exhibit 3, text messages; 3
19 pages, marked for identification.)

20 Q. This is a three-page document and the
21 first two pages bear Bates numbers Frontier 12162 to
22 63. The third page is not consecutive. It's
23 Frontier 12260.

24 Let me direct your attention to the very
25 top of this exhibit. That would be on Frontier

1 R. Fanning

2 A. Specifics, I do not recall. But I do
3 recall they did come to an agreement.

4 Q. But you don't recall as you sit here
5 today what the terms of that agreement were?

6 A. Correct.

7 Q. Do you know whether it was simply just
8 accepting the request of Frontier?

9 A. No. I mean, Mr. Butler, there's back and
10 forth. Remember, ALC were just one -- like AMCK
11 were just one of many lessors that I was in
12 conversation about coming to some type of an
13 agreement regarding a rent deferment.

14 The specifics, I don't remember. I do
15 remember that other than two lessors out of the
16 lessors that we had sent around deferral agreements,
17 everybody had agreed to some type of rent deferral
18 agreement.

19 Q. You've testified a couple of times today
20 that you believe all of the represent deferral
21 request letters went out on the same day; correct?

22 A. That is my understanding.

23 Q. Do you recall when the decision was made
24 within Frontier to send this type of rent deferral
25 letter out to all of the lessors?

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R. Fanning

me whether it be on a month-to-month basis.

Q. Did you ever see any email or text from Mr. Sheridan confirming the supposed agreement that he reached with Mr. Dempsey?

A. I don't recall.

Q. Do you recall ever seeing any email or text from Mr. Dempsey, apart from the text to you, any email or text to Mr. Sheridan purporting to confirm that agreement?

A. I don't recall.

Q. I think you testified that your understanding was that the month-to-month deferral applied to all 15 aircraft.

Did I hear you correctly?

A. That was my understanding before Jimmy had sent that text, yes.

Q. But here you seem to be saying it was part of a deal that the March 16 delivery would be excluded from the month-to-month deferral; is that right?

A. Well, we had paid, obviously -- Mr. Sashikumar had asked us to pay the rent for that aircraft on the due date, which we did. My assumption -- well, my recollection is that it was

1 R. Fanning

2 part of the -- that aircraft was part of the 15
3 aircraft.

4 But subsequent to Jimmy speaking to Paul,
5 obviously they came to an agreement that that
6 aircraft was excluded. So prior to that
7 discussion -- my recollection that prior to that
8 discussion that that aircraft was part of the
9 agreement.

10 Q. I just want to ask about the chronology
11 here. We've seen from the documents I've shown you
12 that on April 6 Mr. Sheridan sent an email
13 confirming a 10-day grace period through April 21,
14 2020.

15 Do you recall that?

16 A. Based on what you showed me, yes.

17 Q. And then on the next day, April 7th,
18 there's a text from Jimmy Dempsey saying that
19 Mr. Sheridan had agreed to a month-to-month
20 deferral, right, we just saw that exhibit? Do you
21 recall that?

22 A. Yes.

23 Q. Was there any discussion -- how do you
24 reconcile those two things? One day there's a
25 10-day grace period, and the next day there's

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R. Fanning

agreement to everything Frontier was asking for, a
three-month deferral with no strings attached?

MR. HOSENPUD: Objection, form. You can
answer.

A. Mr. Butler, like anything, it's
negotiations. Right. One day you may have one
agreement. The next day you come to another
agreement. That's between, obviously, Jimmy and
Paul. I wasn't part of that conversation.

Q. And that was going to be my next
question: Do you remember any discussion internally
at Frontier about that apparent change of heart on
the AMCK side?

A. I don't.

Q. Did anyone express surprise that they
seemed to have changed their mind so quickly, to
your recollection?

A. I don't recall. But in the context of a
discussion, I mean, things can change overnight and
that's obviously what appeared to be the case.

MR. BUTLER: Let me show you the next
exhibit which we're going to mark as Fanning
Exhibit 13. It's a one-day document bearing
Bates Number Frontier 3504.

1 R. Fanning

2 What did you understand Mr. Thwaytes to
3 be saying here?

4 A. Pay what we owe.

5 Q. Well, does the deferred payments here
6 refer to the payments that were due in April for the
7 14 aircraft?

8 A. I'm sorry. Say that again, Mr. Butler.

9 Q. When he refers to deferred payments, is
10 he referring to the payments that were due earlier
11 in April for the 14 aircraft leased from AMCK?

12 MR. HOSENPUD: Object to the form. You
13 can answer.

14 A. That appears to be correct.

15 Q. And by true-up, he just means Frontier is
16 willing to pay them? Is that what it means?

17 A. Well, I had offered to -- in text and
18 conversation to pay Jane or to pay AMCK what they're
19 owed. So that is correct.

20 Q. And Mr. Thwaytes here is expressing his
21 willingness to just go ahead and pay those deferred
22 amounts; correct?

23 A. Correct.

24 Q. And is it your recollection that at this
25 time it wasn't only Mr. Thwaytes but others at

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R. Fanning

Frontier were willing to pay those amounts that had been due in April?

A. As part of the ongoing negotiations; that is correct.

Q. Was there any discussion within Frontier about just going ahead and making those payments?

A. In the context of internal discussions, it would have been related to the conversations that I had with Jane and obviously Jimmy had with Paul. It didn't appear that we need to make -- from my recollection, it didn't appear that we needed to make a payment based on the negotiations that were going on at that time and their willingness to try and resolve the asks that Accipiter were asking at that time.

Q. My question was: Was there any internal discussion you can recall at Frontier about just going ahead and paying the amounts due in April?

A. If AMCK had asked for us to make the payment, we would have made the payment.

Q. Well, you said that before March of 2020 Frontier had always made its rent payments on time; is that correct?

A. That is correct.

1 R. Fanning

2 Q. And they made those rent payments on
3 time, I assume, even though there wasn't a specific
4 request for those payments; is that right?

5 A. No. In this regard we had requested a
6 payment deferment schedule with all lessors. What
7 you're inferring is that -- what you're inferring is
8 that we had -- so, yes, we had paid our rent
9 payments on time. But during March it became
10 apparent that we need to set up a schedule or send
11 out an ask to our vendors, including lessors, for a
12 rent payment schedule or deferment on that
13 obligation.

14 Q. Well --

15 A. There's a difference, in my opinion, on
16 making rent prior to March of 2020.

17 Q. I understand there's a difference. I'm
18 not trying to suggest it's exactly the same. But
19 with that track record of always paying rent on
20 time, I just wonder if there was any discussion
21 about maybe we should just stop this deferral
22 request and just go ahead and pay the amounts.

23 Do you recall any discussion like that?

24 A. The only parts that I recall was the
25 understanding that we had an agreement whether it

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R. Fanning

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was me with Jane or Jimmy with Paul that we did not

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have to make payments at that time because of the

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ongoing discussion.

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Q. In this email that you quote from Jane,

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she's expressing the view that AMCK or -- or

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expressing the position that AMCK is not comfortable

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with the remaining deliveries under the framework

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agreement unless Frontier gets current on all of its

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rent payments.

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Is that your understanding of AMCK's

12

position at that time?

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A. Yes.

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Q. And, in fact, were there a number of

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communications where Jane O'Callaghan said to you or

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texted you or emailed you that AMCK did not want to

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take new deliveries if there was any overdue rent on

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the other aircraft?

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A. No. My recollection is that I had

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sent -- and it was probably after the 23rd, I think

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it was on the 25th, that I had expressed to Jane

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that we would pay what we had owed. But she never

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responded back to me in a text.

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Q. Well, my question is: Sir, do you recall

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that being a position that AMCK was taking at this

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R. Fanning

time, that Frontier needed to get current on all of its rent payments in order for a new delivery to be accepted?

MR. HOSENPUD: Object to the form.

A. Repeat yourself, Mr. Butler.

Q. My question is: Do you remember that being AMCK's position? You were negotiating with them at this time. Was one of their positions that they expected Frontier to be current on all of its payments before the next delivery to be funded under the framework agreement?

A. That is my understanding, yes.

Q. And in the context of that understanding, did you consider just paying the rent, because then that would obviate the concern this is being raised by AMCK?

A. Well, I did. I sent a text to Jane on the basis of, do you want us to pay the rent. I never got a response, Mr. Butler.

Q. Didn't AMCK always want you to pay the rent?

MR. HOSENPUD: Object to the form. You can answer.

A. Not after the negotiations. Our belief

1 R. Fanning

2 was we weren't required based on the discussions
3 going on at that time that there was an
4 understanding -- hold on, Mr. Butler. That there
5 was an understanding that if AMCK wanted us to make
6 the payments, there is a process that they have
7 internally that they would have sent us, which they
8 didn't, and we -- the payments weren't made based
9 on, again, the discussions that we were having with
10 Paul and Jane at that time that we were not
11 required.

12 Q. Mr. Fanning, it wasn't AMCK's idea for
13 Frontier to stop paying the rent under those 14
14 lease agreements; isn't that right?

15 A. Well, we had made a request back in March
16 for a deferment.

17 Q. Right. It wasn't their idea, you made
18 the request; right?

19 A. Yes.

20 Q. Didn't you believe at all times that AMCK
21 wanted Frontier to pay the rent on the date that
22 it's due?

23 A. Under the discussions at that time, no.
24 They were willing to work with us and understood why
25 we weren't making those payments.

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R. Fanning

Q. So your understanding at that time was that AMCK didn't really care that much about the rent, they were willing to go along as long as the negotiations continued without being paid rent?

A. In good faith, yes, absolutely.

Q. So that's --

A. Let me put it another way. Let me put it another way, Mr. Butler. If AMCK had asked us to pay the rent, we would pay the rent. And I had asked Jane, do you want me to pay the rent. We never got an answer.

Q. When did you ask her that question?

A. Two days after this text, the 23rd -- the 25th. So the 25th of April. I never received an answer.

Q. And you interpret that to mean that AMCK did not want you to pay the rent?

A. My understanding was at that time that they knew we were in discussions of resolving what AMCK's ask was. And that in the grand scheme of the negotiation, it was understood that if we were required to make the payment, we would have made the payment. We had the ability to make the payment and our attention would have been to make -- if

1 R. Fanning

2 requested, we would have made the payment. Or their
3 accounting would have sent us a letter and reminded
4 us that a payment was due as they had -- as they had
5 prior -- I'm sorry previous to March. And then, I
6 believe, during the summer they had requested if a
7 payment had been made. We never got that
8 communication from their accounting department.

9 My understanding was the reason why we
10 didn't was because they were aware that we were in
11 discussions with Paul and Jane to resolve the
12 ongoing discussions at that time.

13 Q. That was your assumption; is that right?

14 A. That was my belief based on the
15 conversations that I had with Jane and that Jimmy
16 had with Paul.

17 Q. I thought you just testified that you
18 asked Jane whether you needed to pay rent and she at
19 this particular time give you a response?

20 A. That is correct.

21 Q. She didn't write back and say, no, don't
22 worry about the rent, it's no problem; correct?

23 A. She never replied, Mr. Butler.

24 Q. But when you ask a question, do you want
25 me to pay the rent and she never replied, did that

1 R. Fanning

2 Do you see that?

3 A. Yes.

4 Q. Would you assume from looking at this
5 that this document contains all of your texts back
6 and forth with Jane O'Callaghan during that time
7 period?

8 A. As best as I can recall, yes.

9 MR. BUTLER: Gege, if you can go back up
10 to the first page of the exchanges.

11 Q. I can see for this set of text messages,
12 it looks like your texts are on the left side of the
13 page and Jane's texts to you are on the right side
14 of the page.

15 Is that the way texts appear on your
16 phone?

17 A. The phone I had at that time, yes.

18 Q. So you would have the things you wrote on
19 one side and things Jimmy and Paul wrote on the
20 other side, in chronological order, I assume?

21 A. That appears to be the case.

22 Q. And was the case on your phone at that
23 time?

24 A. Yeah. Yeah.

25 Q. So the first text that I want to ask you

1 R. Fanning

2 about is on the second page of this document, AMCK
3 16975. And it's near the bottom. There's a series
4 of texts on March 31st of 2020. And I see there are
5 three texts for you. There's a response from Jane.
6 And I want to ask you about the next text.

7 You say in the last two lines of this
8 text, quote, Airbus will not delay delivery without
9 it costing Frontier, end quote.

10 I was wondering, what did you mean by
11 that when you wrote that to Ms. O'Callaghan?

12 A. Well, cost is a substantial amount of
13 losses meaning they would put us in default if we
14 didn't take delivery of the aircraft when they asked
15 us to take delivery of the aircraft.

16 Q. So the cost you're referring to here is
17 not a financial cost, it's a default under the
18 purchase agreement with Airbus?

19 A. Well, we would lose our PDP payments. So
20 yes. And be put into default with Airbus.

21 Q. Was Airbus willing to agree to delay
22 deliveries to Frontier if Frontier paid the storage
23 costs for the Airbus?

24 MR. HOSENPUD: Objection, form. You can
25 answer.

1 R. Fanning

2 A. So, Mr. Butler, let me give you a little
3 bit of context. The first aircraft that AMCK took
4 delivery of was in Toulouse, France. They have a
5 huge amount of flexibility and capability at that
6 airport given that the majority of Airbus aircraft
7 are manufactured there. The remaining aircraft that
8 AMCK was going to take delivery of were in Mobile,
9 Alabama.

10 To give you the context, I believe at
11 this time Airbus were producing 30 plus A320s a
12 month. In Mobile, Alabama, my recollection is that
13 they were only producing three aircraft a month.
14 They do not have the ability to store or house
15 aircrafts the way that Toulouse. My recollection is
16 that, Jane, part our discussions, invoiced this to
17 Jane and this is part of the reason why Airbus were
18 pressuring Frontier to take delivery of these
19 aircraft because they did not have the ability to
20 store the aircraft. So in the context of your
21 question, whether Airbus were willing to store the
22 aircraft for a cost, I -- my recollection was that
23 Airbus didn't have the ability to do so.

24 Q. I think you also testified earlier that
25 you were not directly involved in the discussion

1 R. Fanning

2 with Airbus; is that right?

3 A. No. But I am aware of when -- I am
4 involved in the delivery process and the delivery
5 schedule of when these airplanes get delivered. So
6 I am familiar -- I have been to Toulouse. I have
7 been to Mobile, Alabama. I am aware of their
8 surroundings of what they're capable of.

9 Q. I understand. But in terms of the
10 positions that Airbus was taking in the discussions
11 with Frontier over delaying the Airbus, who would
12 have told you about Airbus' position?

13 A. It would have been Jim, Jim or Spencer.

14 Q. And those two individuals were directly
15 involved in discussions with Airbus; is that your
16 recollection?

17 A. That's correct.

18 Q. Do you recall hearing from those
19 individuals that Airbus was willing to delay the
20 deliveries, but there would be a substantial
21 financial cost to Frontier?

22 A. I do not -- I do not recall that specific
23 question or that context to the question you asked.

24 Q. And so I gather that's not what you meant
25 when you texted to Jane O'Callaghan that Airbus will

1 R. Fanning

2 not delay the delivery without it costing Frontier?

3 A. No. When I meant costing, I was aware
4 that they would put us into default. That was
5 communicated to me by Spencer and obviously Jimmy
6 had mentioned it at some point in time based on
7 conversations he had. So I knew at that point in
8 time Airbus was putting significant pressure for us
9 to keep the delivery dates that we had in agreements
10 with them. That's what I meant by costing Frontier.

11 Q. What would be the consequence, in your
12 mind, of Airbus putting you in default for not
13 taking a delivery on time?

14 A. I mean, it would cripple the airline to
15 where it may potentially put us out of business.
16 Domino effect of the cross of provisions that we
17 have in our aircraft leases.

18 Q. So were you concerned at that time if you
19 couldn't take a delivery from Airbus, that Airbus
20 was going to put the airline out of business?

21 A. Well, they were putting a lot of pressure
22 on Jimmy to take delivery of these airplanes. I
23 mean, there's a relationship there but at some point
24 in time -- and Airbus has done this with other
25 airlines, there does come a point in time where

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R. Fanning

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they're not willing to accommodate the request any

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more than a decision is made to put an airline in

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default or cancel potential future deliveries.

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There could be many way.

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Again, I wasn't part of those

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discussions. Although I was aware based on

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communication from Spencer with his representative

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of Airbus that Airbus were willing to potentially

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put us under a default situation if we didn't take

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delivery. So obviously I reiterated this to Jane to

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let her know that, you know these issues were coming

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up and Airbus were forcing -- substantially pushing

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us to commit to the original delivery schedule that

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we had agreed.

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Q. And certainly at this point in time it

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looks like you're saying to Ms. O'Callaghan that you

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won't be able to get delivery delays for the five

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remaining deliveries under the framework agreement;

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is that right?

21

A. When was this -- this text was what,

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April 1st?

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Q. I think this one was March 31st.

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A. So we would have been in -- so, again, at

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that point in time, we would have been in the

CERTIFICATE

STATE OF NEW YORK)

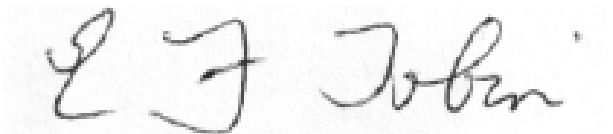
) ss.

COUNTY OF SUFFOLK)

I, Elizabeth F. Tobin, a Registered Professional Reporter and Notary Public within and for the State of New York, do hereby certify:

That Robert Fanning, the witness whose deposition is hereinbefore set forth, was duly sworn by me remotely and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

A handwritten signature in cursive script, reading "Elizabeth F. Tobin". The signature is written in dark ink on a light background.

ELIZABETH F. TOBIN, RPR